Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

CLEOPATRA McDOUGAL-SADDLER,

Petitioner,

versus

ALEXIS M. HERMAN, Secretary, U.S. DEPARTMENT OF LABOR

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR CERTIORARI

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QUESTIONS FOR REVIEW

Does 5 U.S.C. § 8128(b), the "door-closing" provision of the Federal Employees Compensation Act ("FECA"), preclude federal question jurisdiction over a declaratory judgment action challenging a written policy of the Secretary of Labor that plainly violates a clear statutory mandate granted by Congress to FECA claimants? The Third Circuit's conclusion is in conflict with the four Circuits that have already reviewed this issue.

Does 5 U.S.C. § 8123(a) contain a clear statutory mandate that the Secretary of Labor has lawlessly disregarded?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Third Circuit filed July 2, 1999 is set forth in the Appendix at p. 1a and is reported at 184 F.3d 207. The decision of the United States Court of Appeals for the Third Circuit filed November 17, 1998 is set forth in the Appendix at p. 18a The opinion of the United States District Court for the Eastern District of Pennsylvania dated December 24, 1997 is set forth in the Appendix at p. 38a. These decisions are unreported.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

Jurisdiction is provided by 28 U.S.C. § 1254(1). The United States Court of Appeals for the Third Circuit issued a decision in this case on November 17, 1998. Panel rehearing was requested and the panel vacated its decision dated November 17, 1998. Subsequently, the United States Court of Appeals for the Third Circuit issued a decision in this case on July 2, 1999. Rehearing *en banc* was timely requested. Rehearing was denied on October 6, 1999. This Petition was timely filed within 90 days of that denial and is thus timely.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

5 USC § 8128(b) Review of award

(b) The action of the Secretary or his designee in allowing or denying a payment under this subchapter [5 USCS §§ 8101 et seq.] is--

(1) final and conclusive for all purposes and with respect to all questions of law and fact; and

(2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

5 USC § 8123(a) Physical examinations

(a) An employee shall submit to examination by a medical officer of the United States, or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonably required. The employee may have a physician designated and paid by him present to participate in the examination. If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.

STATEMENT OF THE CASE

This is a case involving the Federal Employees Compensation Act ("FECA"), 5 U.S.C. § 8101 *et seq,* the workers' compensation law for federal employees. FECA is administered by the Secretary of Labor through the Office of Workers' Compensation Programs ("OWCP").

FECA contains a provision at 5 U.S.C. § 8123(a) that mandates the appointment of a duly qualified third physician (a tie-breaker) "in case of any [1]. . disagreement between the

[1]The word "any" was inexplicably dropped in the 1966 restatement of Title 5. Compare 5 U.S.C. § 771 (1964) with 5 U.S.C.

physician making the examination on the part of the United States and the employee's physician." In this provision of FECA, the 1916 Congress created an unusual and elegant solution to the vexing problem faced in all types of injury compensation systems: how are the medical cause and extent of injuries decided when there is disagreement amongst the medical evaluators? Usually, workers' compensation and other injury programs vest this authority in a fact-finder who evaluates the various medical opinions and reaches a conclusion; the 1916 Congress vested this power with physicians. In 1983, the Secretary of Labor administratively removed this provision from FECA.

The termination of petitioner McDougal-Saddler's FECA benefits was affirmed at the highest level of review afforded under FECA in a decision that explicitly denied her the statutorily mandated protection of the "third physician". This was accomplished using a "weighing the medical evidence" policy that reversed seventy years of adherence to the statute. According to the Secretary, the goal of this weighing of the evidence policy is "returning more employees to duty" and "reducing the compensation costs of Federal agencies." Under this policy, the Secretary may discount the weight of the opinion of the FECA claimant's physician, may determine that the contrary finding of the Secretary's selected doctor is superior in quality and force, and may then terminate or simply reject a claim based on the

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§8123 (a)(1994). The revision promised to effect no substantive changes. See Act of Sept. 6, 1966, § 7(a), 89 Stat. 631, reprinted in 1966 U.S. Code Cong. & Admin. News 767. This Court has explained that in this circumstance the statutory provision must be read as if the word was never dropped. *See United States v. Lorenzetti*, 467 U.S. 167, 167, 174-75 n.3 (1984)(giving no effect to omission by the codifiers of the word "therefor" from provision of FECA).

"weight" of the evidence. This policy ignores the statutory requirements of 5 U.S.C. § 8123(a).

Ms. McDougal-Saddler challenged this policy by means of a declaratory judgment action in the Eastern District of Pennsylvania, utilizing federal question jurisdiction. She asserted that FECA, in 5 U.S.C. §8123(a), plainly prohibits the weighing policy when there is "any disagreement" between the claimant's and the government's medical experts. The district court found no violation of a clear statutory mandate. The court of appeals [hereafter "Panel Decision"], relying upon the FECA reviewability clause, 5 U.S.C. § 8128(b), found that it could not review a Labor policy that violates an important procedural right that FECA grants in clear statutory terms to federal workers.

REASONS FOR GRANTING THE WRIT

A. The Panel Decision Authorizes Lawless Action By the Secretary of Labor.

The Panel Opinion fails to recognize the implications of the precedent it sets. It twice admits that the Secretary has likely violated the statute: "Notwithstanding the explicit language of § 8123(a) ... OWCP [Office of Workers Compensation Programs] weighs the medical reports when determining whether to appoint a third physician." [8a]; and "It is difficult to square this weighing process with the § 8123(a) mandate ..." [8a]. Yet in denying declaratory judgment review of a Labor policy that conflicts with plain statutory commands, the Panel Decision shuts the door on any judicial inspection of the legality of the Secretary's regulations and policies. In effect, it has Congress saying, through the ambiguous language found in § 8128(b); "Here

are many statutory rules and orders that you may follow, if you think it convenient."

The Secretary's weighing process was instituted in 1983 as a cost savings measure. Time and expense could be saved in the adjudication of FECA claims by dispensing with the appointment of an independent doctor as a tie-breaker. Never mind that Congress instructed that the Secretary "shall appoint" a "third physician" in case of "any disagreement" between claimant's and the government's doctors; instead, OWCP lay-examiners simply "weigh" the relative strengths of the competing medical opinions and act as tie-breakers themselves. The 1916 Congress instructed that any determination of medical issues shall be left to physicians, the Secretary of Labor revised FECA and the result is that only sometimes does a third-physician resolve medical issues. According to the Panel Decision, the door-closing provision of FECA allows this type of lawless agency action to escape review. It is extremely difficult to envision that this is the type of absolute and unreviewable power that Congress granted the Secretary of Labor.

Based upon the Panel Decision, the Secretary's actions in a FECA claim cannot be limited by **any** Court, let alone the plain language of the statute. For budgetary reasons, political reasons, or to merely satisfy a personal whim, according to the Panel Decision, the Secretary may revise or disregard any provision of FECA that she chooses. Perhaps the Secretary will decide to eliminate postal or judicial workers from the FECA program. What authority limits her power? Under the Panel Decision, none.

This strikes petitioner as a truly extraordinary federal administrative program, previously unknown in American

history, in which an agency is delegated full power to restructure as it wishes a detailed statutory program. It is quite frightening to think that this could possibly be the wish of Congress.

This Honorable Court must grant this Petition for Certiorari so that appropriate judicial control can be asserted over the Secretary of Labor's lawless administration of an important federal benefits program.

B. The Panel Opinion Conflicts With The Precedents of Four Circuits.

Four U.S. Courts of Appeal have assumed jurisdiction to review FECA policies against a claim that the policies violated clear statutory mandates. *See Staacke v. United States Sec. of Labor*, 841 F.2d 278 (9th Cir. 1988); *Woodruff v. United States Dep't of Labor*, 954 F.2d 634 (11th Cir. 1992); *Brumley v. United States Dep't of Labor*, 28 F.3d 746 (8th Cir.1994), *cert. denied*, 513 U.S. 1082 (1995): *Hanover v. Reich*, 82 F.3d 1304 (4th Cir. 1996). Although none found on the merits for the FECA claimant, each Circuit asserted jurisdiction and did decide whether the Secretary had violated a clear statutory mandate. This renders inexplicable the Panel Opinion's classification of these holdings as "dicta." [17a (fn.2),31a]. The Panel Opinion joins only one other circuit in denying judicial power to correct plain illegalities of the Secretary in the FECA program. *See Paluca v. Secretary of Labor*, 813 F.2d 524 (1st Cir. 1987), *cert. denied sub nom.*,484 U.S. 943, 98 L. Ed. 2d 355, 1987, 108 S. Ct. 328, (1987): *Roberts v. Secretary of Labor*, 484 U.S. 943 (1987).

This Honorable Court must grant this Petition for Certiorari so that the Court can resolve the conflict amongst

the U.S. Courts of Appeal concerning the scope of the door-closing provision found at 5 U.S.C. § 8128(b).

C. The Panel Decision Defies U.S. Supreme Court Reviewability Case Law

No Supreme Court precedent examines whether the door-closing provision at § 8128(b) prohibits judicial review of Labor's FECA policy for violations of statutory mandates. But the Court's precedents do instruct lower courts on the required analysis.

The agency seeking to avoid judicial review carries a "heavy burden" to overcome "the strong presumption that Congress did not mean to prohibit all judicial review." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 672 (1986), *quoting Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975). The presumption and correlative burden derive from "[T]he right of every individual to claim the protection of the laws," being "the very essence of civil liberty." *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (John Marshall, C.J.). To discharge this burden, the agency must demonstrate that five elements combine to demonstrate Congress' desire to cut off review: the reviewability statutory language, the structure of the statutory scheme, the statute's objectives, the legislative history, and the nature of the administrative action involved. *See, e.g., Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1993). The court must also ask "whether the claims can be afforded meaningful review." *Thunder Basin Coal Co. v. Reich*, *supra* at 207.

The Panel Opinion completely disregarded this methodology; indeed, it did not even point to the statutory

words that it believed, incorrectly, shut off review. Had it obeyed the Court's dictates, the Panel would have decided in favor of review.

First, the clause dealing with judicial review, 5 U.S.C. § 8128(b), reads:

> [T]he action of the Secretary or his designee in allowing or denying a payment is – (1) final and conclusive for all purposes with respect to all questions of law and fact; and (2) not subject to review by another official of the United States or by a Court by mandamus or otherwise.

The clause only specifically limits review of "action ... in allowing or denying a payment." There is nothing limiting a challenge to a policy, let alone a policy that clearly violates a statutory mandate. The section's focus is not upon every action of the Secretary whatsoever, but rather, to repeat, only "the action ... in allowing or denying a payment." These words are not broad enough to cover her actions in issuing rules and policies that fundamentally change the meaning and effect of statutory provisions.

Section 8128(b) originated in the Act of July 28, 1945, § 4, P.L. 161, 59 Stat. 503-04; S. Rep. No. 421, 79th Cong., 1st sess. 2 (1945). At the time there was an effort to resolve the claims of foreign nationals who had assisted the American war effort around the world. There was considerable concern to resolve these claims in an expeditious manner. For this reason, Congress limited judicial review of fact and law findings concerning the claims of such foreign nationals. Please notice the huge gap

between §8128(b)'s original purpose and its application herein to bar a challenge to a Department of Labor policy applied here in the United States to the detriment of an injured American citizen working in Philadelphia.

Had the Panel Opinion paid close attention to the statutory words, it would have seen this case as controlled by Court precedents which read reviewability clauses in benefit statutes as precluding judicial review only of individual benefit decisions and not of across-the-board policies. *See Johnson v. Robinson,* 415 U.S. 361, 370 (1974) (veterans' benefits non-review clause aimed at unburdening courts from flood of small claims challenging the merits of individual compensation decisions); *Traynor v. Turnage*, 485 U.S. 535, 544 (1988) (testing VA regulation for statutory violation does not violate purpose of non-review provision).

Second, the Panel Decision fails to discuss how declaratory judgment actions like McDougal-Saddler's would interfere with objectives and functioning of FECA. This too would have cut against its decision. This is a case that challenges an across-the-board policy of the Secretary of Labor that flatly contravenes an express mandate of Congress. This is not a "nickel and dime" appeal of the Secretary's findings of fact or application of law in a FECA determination. An occasional lawsuit challenging a DOL regulation or policy issuance would not hamper the statute's administration.

Third, the statute's objectives --providing income security for federal workers and their families -- can hardly be furthered by vesting a "rewrite" power in the Secretary of Labor, particularly when budget concerns are foremost in the Secretary's mind.

Fourth, § 8128(b) is not a paradigm of congressional deliberation. Analysis of § 8128(b) reveals that it originated as a clause concerning the disposition of FECA claims by foreign nationals following the close of World War II and was never expanded. Inexplicably, the 1966 codifiers of Title 5 appear to have accidentally elevated this clause to its current prominence. *See Czerkies v. United States Dept. of Labor,* 73 F.3d 1435, 1441 (7th Cir. 1996) (Posner, C.J.; provision "may well have been an accident").

Fifth, as detailed above, the nature of the administrative action sought here to be reviewed is basic FECA policy, not a run-of-the-mill benefit determination.

Finally, without judicial review, petitioner McDougall-Saddler will have lost statutory benefits without having been afforded the opportunity Congress gave her to prove her entitlement and *will be absolutely without means of legal redress.*

Petitioner urges that certiorari be issued so that appropriate judicial control can be asserted over the Secretary of Labor's administration of an important federal benefits program.

D. An Important Reviewability Question Is Posed.

Under what circumstance is a statutory provision read as precluding any judicial review whatsoever of the lawfulness of agency policy, even though the application of such policy lawlessly deprives an individual of rights granted by Congress? This is the important legal question posed by *McDougal-Saddler.*

When the Court has shut off review, it has been careful to note that alternative remedies existed for judicial relief. *See, e.g., Board of Governors v. Mcorp Financial, Inc.*, 502 U.S. 32, 43-44 (1991) (stating "FISA expressly provides Mcorp with a meaningful and adequate opportunity for judicial review ... an unquestioned right to review of both the regulation and its application."). *Compare Oestereich v. Selective Serv. Sys.*, 393 U.S. 233, 238 (1968) ("unnecessary harshness" to construe statute as requiring draftee to defend himself by habeas or as a criminal defense).

Petitioner urges that certiorari be issued as the Panel Opinion leaves her without any remedy.

E. The Question Is of Exceptional Importance to Federal Workers

The United States Government has 2,895,000 employees. *See* 1998 STATISTICAL ABSTRACT OF THE UNITED STATES table. 531, p. 331 (Oct. 1998). FECA affords them economic security. The vast bulk of these workers are protected against wage loss caused by job-related injuries, diseases, and death by virtue of that statute. *See* 5 U.S.C. § 8101 (1)(A)-(E) (defining covered "employee"). Each year about 180,000 employees file FECA claims. *See* OWCP ANNUAL REPORT TO CONGRESS: FY 1996 (1997) at table A-2, p. 43. Each of these disability claims is subject to the "weighing of the medical evidence" policy that McDougal-Saddler is attempting to challenge in this case and which the Panel Decision admitted was likely illegal.

It is to do justice for large numbers of future FECA claimants that certiorari must issue in this case and the Panel Opinion be ultimately reversed.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the petition for certiorari be granted.

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184 F.3d 207

CLEOPATRA McDOUGAL-SADDLER, Appellant v. ALEXIS M. HERMAN, Secretary, U.S. Department of Labor, Appellee

No. 98-1068

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

October 8, 1998, Argued

July 2, 1999, Filed

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JUDGES:

Before: McKEE, RENDELL, Circuit Judges, and DEBEVOISE, Senior District Judge *

OPINIONBY:
DICKINSON R. DEBEVOISE

OPINION:

OPINION OF THE COURT

DEBEVOISE, Senior District Judge:
Appellant, McDougal-Saddler, appeals the district court's order granting the motion of Cynthia Metzler, Acting Secretary, United States Department of Labor ("DOL")[1] to dismiss the complaint for lack of subject matter jurisdiction. We have jurisdiction over this appeal pursuant to *28 U.S.C. § 1291.* In an earlier opinion we affirmed the district court on the ground that McDougal-Saddler lacked standing to bring this action. Upon her petition for panel rehearing we vacated that opinion and asked for supplemental briefing.

We will now affirm, holding that by virtue of *5 U.S.C. § 8128*(b) the district court did not have jurisdiction.

I. The Facts

On May 14, 1982 McDougal-Saddler, then a 39-year old U.S. Postal Service distribution clerk, filed a claim with the Office of Workers' Compensation Program ("OWCP") for an injury to her back, upper neck and shoulder sustained on May 8 when handling trays of mail. On June 24 the OWCP began payment of compensation for temporary total disability. Dr. David S. Schwartz, a Board-certified internist and cardiologist, began treating McDougal-Saddler on August and diagnosed cervical and lumbosacral strains. He found his patient to be totally disabled.

After a February 1985 fitness-for-duty evaluation, McDougal-Saddler was offered and accepted reemployment as a distribution clerk with limited duties. She returned to work on March 31, 1985 but again stopped working on April 5, stating that because of pain in her neck, shoulder, arm and back she could not continue. Dr. Schwartz examined her the next day; he diagnosed cervical and lumbar strain and stated she was totally disabled.

On May 7, McDougal-Saddler filed a claim for a traumatic injury to her neck, shoulders and upper and lower back sustained on April 5 when casing mail. On May 20 the OWCP again began payment of compensation for temporary total disability. In a June 17, 1985 report Dr. Schwartz diagnosed cervical radiculopathy. In a May 22, 1986 report he diagnosed chronic pain syndrome including chronic lumbosacral strain and chronic cervical strain. In an April 10, 1987 report Dr. Schwartz wrote, "Because of chronic debilitating pain and limited range of motion due to muscle stiffness and spasm, despite intensive physical therapy and medication, [McDougal-Saddler] is totally disabled from work at this time and for the near indefinite future."

The OWCP referred McDougal-Saddler to Dr. William H. Simon, a Board-certified orthopedic surgeon for a second opinion. In a May 4, 1987 report Dr. Simon diagnosed cervical and lumbar discogenic syndrome with cervical and lumbar nerve root irritation. He concluded that "there is no evidence that she sustained any acute injury that is responsible for this but that she has a slowly developing degenerative condition which limits the amount of work that she can do."

On December 31, 1987 the OWCP notified McDougal-Saddler that it proposed to terminate her compensation on the ground that her disability resulting from her employment injuries had ceased. In response McDougal-Saddler submitted another report of Dr. Schwartz in which he stated that her symptoms were "specifically due" to her May 8, 1982 injury and that her April 5, 1985 injury "added to her previous cervical and lumbosacral strain."

Effective November 20, 1988 the OWCP terminated McDougal-Saddler's compensation on the ground that the weight of the medical evidence established that her disability from her employment injuries ceased by that date. After a hearing an OWCP hearing representative found in a February 21, 1989 decision that McDougal-Saddler had not been afforded due process because she had not been provided with a copy of Dr. Simon's May 4, 1987 report. The hearing representative remanded the case for reinstatement of compensation and a re-evaluation by Dr. Simon.

At Dr. Simon's request a Board-certified radiologist performed a computerized tomography scan of McDougal-Saddler's lumbosacral and cervical spine. On the basis of the resulting report Dr. Simon revised his original opinion, stating in a November 15, 1989 report, "we now have objective evidence that this patient has cervical discogenic abnormalities beyond degenerative changes both in her neck and back."

Based on the entirety of the reports which had been submitted to it, the OWCP found that there was a conflict of medical opinion. On October 22, 1991, it referred the case to Dr. John T. Williams, a Board-certified orthopedic surgeon, to resolve

the conflict. The OWCP purported to act pursuant to the provisions of *5 U.S.C. § 8123*(a), which provides: "If there is disagreement between the physician making the examination for the United States [Dr. Simon] and the physician of the employee [Dr. Schwartz], the Secretary shall appoint a third physician who shall make an examination." According to the Federal (FECA) Procedure Manual, "The [Employees' Compensation Appeals Board] has stated that 'an impartial specialist's report is entitled to greater weight than other evidence of record as long as his conclusion is not vague, speculative or equivocal and is supported by substantial medical reasoning'." Part Two, Chapter 2-810.11 c.(2).

Dr. Williams conducted a physical examination of McDougal-Saddler, reviewed the medical records and in a March 4, 1992 report stated, among other things, that "what we are seeing here is the progression of degenerative joint and degenerative disc disease over a period of approximately seven years secondary to the normal wear and tear on the body and the aging process. The work-related injury did not cause the degenerative pathology first noted in 1987."

The OWCP terminated McDougal-Saddler's compensation on September 20, 1992, concluding that the weight of the medical evidence, represented by Dr. Williams's reports, established that the effects of her April 5, 1985 and May 11, 1982 injuries had ceased. On appeal an OWCP hearing representative found in a November 24, 1993 decision that the opinion of Dr. Williams, the impartial medical specialist, resolved the conflict of medical opinion and established that the effects of the 1982 and 1985 injuries had ceased by September 20, 1992. By letter dated February 27, 1995 McDougal-Saddler requested reconsideration, contending,

among other things, that Dr. Williams was not an impartial medical specialist entitled to special weight because Dr. Simon's November 15, 1989 report did not conflict with the conclusions of Dr. Schwartz. The OWCP denied the request for reconsideration, and McDougal-Saddler appealed to the Employees' Compensation Appeals Board ("ECAB").

The ECAB authored a detailed opinion. It weighed the evidence which had been developed during the years following McDougal-Saddler's original injury in May 1982. It contrasted the qualifications of Drs. Williams and Schwartz and analyzed the basis and reasoning of their respective reports. It found "that the weight of the medical evidence establishes that [McDougal-Saddler's] disability related to her May 8, 1982 and April 5, 1985 employment injuries ended by September 20, 1992."

The ECAB, however, agreed with McDougal-Saddler's contention that Dr. Williams was not an impartial medical specialist because at the time of his appointment there was no conflict of medical opinion.

The consequence which the ECAB attributed to the denial of impartial medical specialist status to Dr. Williams was ". . . the reports of Dr. Williams are thus not entitled to the special weight afforded to the opinion of an impartial medical specialist resolving a conflict of medical opinion . . ." The ECAB treated Dr. Williams's reports in the same manner as it treated the other medical evidence, giving it no special deference. It weighed the totality of the evidence and on March 20, 1996 affirmed the decision of the OWCP. Thereafter it denied a petition for reconsideration.

McDougal-Saddler contends that the procedures leading to the denial of her benefits were in violation of the clear mandate of *5 U.S.C. § 8123*(a) which provides in relevant part:

> If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary **shall appoint a third physician who shall make an examination**.

(emphasis added).

This mandate is implemented by regulation:

> If there should be disagreement between the physician making the examination on the part of the United States and the injured employee's physician, the Office **shall appoint a third physician, qualified in the appropriate specialty, who shall make an examination . . . .** (emphasis added).

20 C.F.R. § 10.408.

The ECAB's opinion held that Dr. Williams was not an impartial expert because there was no conflict of medical opinion at the time his opinion was sought. Thus the "disagreement between the physician making the examination for the United States and the physician of the employee" arose at the time Dr. Williams rendered his opinion.

Notwithstanding the dictate of § 8123(a), the ECAB did not require appointment of "a third physician". Instead it weighed the evidence before it, affirmed the decision of the OWCP terminating compensation and later denied a petition for reconsideration.

Notwithstanding the explicit language of § 8123(a) and implementing regulations, OWCP weighs the medical reports when determining whether to appoint a third physician. In its Federal (FECA) Procedural Manual and in practice, according to McDougal-Saddler, OWCP appoints a third physician only "where the analysis of the evidence demonstrates conflicting opinions or conclusions which are supported almost equally." Generally "careful analysis of the medical evidence should allow for resolution of most issues without resorting to a referee or 'impartial' specialist." (Federal (FECA) Procedure Manual, Part Two, Chapter 2-810-11 a, App. 53).

It is difficult to square this weighing process with the § 8123(a) mandate that "if there is disagreement [between the government and employee physicians] the Secretary shall appoint a third physician." (emphasis added).

McDougal-Saddler filed in the district court a complaint and petition for declaratory and injunctive relief, alleging that DOL has adopted procedures that violate the statutory directive regarding the appointment of a third physician.

II. The District Court Opinion

The DOL moved to dismiss McDougal-Saddler's complaint for lack of subject matter jurisdiction, relying on *5 U.S.C. § 8128*(b) which provides:

> (b) The action of the Secretary or his designee in allowing or denying a payment under this subchapter is--
> (1) final and conclusive for all purposes and with respect to all questions of law and fact; and
> (2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

McDougal-Saddler urged in opposition to the motion to dismiss that two exceptions to the prohibition on judicial review applied. She asserted that the bar did not apply because she presented evidence of a cognizable constitutional violation. She asserted further that the bar did not apply because the actions of the DOL violated a clear statutory mandate.

The district court rejected McDougal-Saddler's constitutional claims. It held that FECA PM 2-810-11a providing for a weighing of the medical evidence before appointing a third physician was simply an interpretive rule clarifying the word "disagreement" in § 8123(a) and therefore did not require public notice or a public comment period to be valid. Its application to McDougal-Saddler did not violate her due process rights or otherwise create a cognizable constitutional claim. McDougal-Saddler does not challenge this ruling in her appeal.

The district court assumed for the purposes of its decision that a violation of a clear statutory mandate creates subject

matter jurisdiction for a court to hear a case brought under FECA. It found, however, that because the ECAB interpretation was plausible, there was no such violation, holding:

> The Court concludes that FECA PM 2-810 instructs claims examiners in how to determine whether a "disagreement" between physicians exists, and that defendant's interpretation of *5 U.S.C. § 8123*(a), using FECA PM 2-810, is plausible. Under that interpretation, it was appropriate for ECAB to decide plaintiff's claim based on the weight of the medical evidence. ECAB did not violate a clear statutory mandate in evaluating plaintiff 's claim. The statute did not, under the facts presented, require ECAB to remand the case for the appointment of an independent physician to conduct an examination of plaintiff.

The court granted DOL's motion to dismiss.

III. Discussion

The statutory provision at issue here provides that "the action of the Secretary or his designee in allowing or denying a payment is - (1) final and conclusive for all purposes with respect to all questions of law and fact; and (2) not subject to review by another official of the United States or by a Court by mandamus or otherwise." *5 U.S.C. § 8128*(b). Although Congress is ordinarily presumed to have intended judicial

review of agency action, "Congress is absolutely free to limit the extent to which it consents to suit" against the United States or its instrumentalities. *Clinton County Comm'rs v. United States E.P.A., 116 F.3d 1018, 1025 (3d Cir. 1997)* cert. denied sub nom. *Arrest the Incinerator Remediation (A.I.R.), Inc., 522 U.S. 1045, 118 S. Ct. 687. 139 L. Ed. 2d 633 (1998).*

The starting point for the determination of Congress's intent is the language of the statute. See *New Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc., 101 F.3d 1492, 1498 (3d Cir. 1996).* In the present case there can hardly be plainer language than that which § 8128(b) employs. The Supreme Court has referred to § 8128(b) as an example of language that Congress uses when it "intends to bar judicial review altogether." *Lindahl v. Office of Personnel Management, 470 U.S. 768, 779-780, 105 S. Ct. 1620, 84 L. Ed. 2d 674 (1985).*

The question whether a statute precludes judicial review "is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block v. Community Nutrition Institute, 467 U.S. 340, 345, 104 S. Ct. 2450, 81 L. Ed. 2d 270 (1984).* Both McDougal-Saddler and the DOL have reviewed the legislative history of FECA and in particular the evolution of § 8128(b). Each side argues that the legislative history supports its position.

In *Czerkies v. United States Dep't of Labor, 73 F.3d 1435 (7th Cir. 1996),* Chief Judge Posner examined the same history and found that it "reveals the limited scope of the

door-closing provision." *Id. at 1440,* and that adoption of the provision "may well have been an accident." *Id. at 1441.* That case, however, concerned a constitutional challenge to action of the DOL. The court held that "the history of the Federal Employees Compensation Act provides no basis for rebutting the presumption of judicial review of constitutional claims. It is distasteful to suppose that an administrative agency would claim to receive from Congress by sheer inadvertence a license to ignore the Constitution." *Id. at 1441.* Although the district court had jurisdiction to hear Czerkies' constitutional claim, the Supreme Court affirmed the judgment dismissing the suit because the constitutional claim was insubstantial.

Unlike Czerkies the present appeal does not involve a constitutional claim. The district court held that adoption and compliance with the provisions in the procedural Manual providing for a weighing of the medical evidence did not violate McDougal-Saddler's due process rights or otherwise create a cognizable constitutional claim. McDougal-Saddler does not challenge that conclusion on this appeal, and we are not required to decide whether § 8128(b) would deprive a district court of jurisdiction to hear such a claim.

It is necessary to decide whether an asserted violation of a clear statutory mandate constitutes a second exception to the statutory bar. We conclude that there is nothing in the legislative history which would permit a departure from the unequivocal language of § 8123(b) to review such an asserted violation, and that the decisions of our court preclude such a departure.

McDougal-Saddler relies primarily upon two United States Supreme Court cases, *Oestereich v. Selective Serv. Sys., 393*

U.S. 233, 89 S. Ct. 414, 21 L. Ed. 2d 402 (1968) and *Leedom v. Kyne, 358 U.S. 184, 79 S. Ct. 180, 3 L. Ed. 2d 210 (1958).* In Oestereich the draft law gave a "plain and unequivocal" service exemption to students preparing for the ministry. Notwithstanding the exemption, Oestereich's draft board reclassified him 1-A as a form of discipline when he returned his registration certificate to protest the Vietnam War. Oestereich brought suit in the United States District Court to restrain his induction. Unambiguously § 10(b)(3) of the Military Service Act of 1967 provided that "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction . . .." The Court declined to apply § 10(b)(3) literally, holding that "since the exemption granted divinity students is plain and unequivocal . . . pre-induction judicial review is not precluded . . . ." *393 U.S. at 238-239.*

In Leedom the National Labor Relations Board included both professional and nonprofessional employees in a collective bargaining unit in clear violation of the National Labor Relations Act. The association representing the professional employees brought suit in the United States District Court challenging the NLRB's action. The NLRA permitted judicial review of a Board certification order by a petition for enforcement or review of an order made under § 10(c) of the Act restraining an unfair labor practice; the Board argued that its order was not otherwise subject to judicial review. The Court held that the review provisions of the NLRA did not preclude an action "to strike down an order of the Board

made in excess of its delegated powers and contrary to a specific prohibition in the Act." *358 U.S. at 188.*

More recent decisions of the Supreme Court and of our Court establish that Oestereich has not been extended beyond its particular facts and that the Kyne "clear statutory mandate" exception will not be applied when the statute provides clear and convincing evidence that Congress intended to deny district court jurisdiction. In *Board of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc., 502 U.S. 32, 112 S. Ct. 459, 116 L. Ed. 2d 358 (1991),* MCorp sought to enjoin administrative proceedings instituted against it by the Federal Reserve Board on the ground that the proceedings were in excess of the Board's authority. It relied upon the Kyne doctrine to overcome the statutory bar to district court jurisdiction. The Court advanced two reasons for applying the statutory bar notwithstanding a claim of violation of a clear statutory mandate. First, MCorp had an alternative means of review. Second:

> . . . [a] related factor distinguishing this litigation from Kyne is the clarity of the congressional preclusion of review in FISA. In Kyne, the NLRB contended that a statutory provision that provided for judicial review implied, by its silence, a preclusion of review of the contested determination. By contrast, in FISA Congress has spoken clearly and directly: "No court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any [Board] notice or order under this section." *12 USC § 1818*(i)(1) (1988 ed,

> Supp II) [*12 USCS § 1818*(i)(1)] (emphasis added). In this way as well, this litigation differs from Kyne.

Viewed in this way, Kyne stands for the familiar proposition that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories v. Gardner, 387 U.S. 136, 141, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967).* As we have explained, however, in this case the statute provides us with clear and convincing evidence that Congress intended to deny the District Court jurisdiction to review and enjoin the Board's ongoing administrative proceedings.

502 U.S. at 44 (footnote omitted).

In *Hindes v. F.D.I.C., 137 F.3d 148, 164 (3d Cir. 1998),* we noted the "limited exception to a statute's withdrawal of jurisdiction where the plaintiff claims that the agency acted in a blatantly lawless manner or contrary to a clear statutory prohibition" and emphasized "that an integral factor in determining the applicability of the exception is the clarity of the statutory preclusion."

In Clinton County plaintiffs sued the United States Environmental Protection Agency ("EPA") to enjoin EPA from proceeding with a trial burn and incineration remedy. The district Court dismissed for lack of subject matter jurisdiction, citing statutory provisions precluding judicial review until EPA's remedial activities were completed. Rejecting plaintiffs' contention that under the Kyne doctrine violation of a clear statutory prohibition constituted an

exception to the statutory bar, we stated "subsequent cases have refined the Kyne doctrine. In *Briscoe v. Bell, 432 U.S. 404, 97 S. Ct. 2428, 53 L. Ed. 2d 439 (1977),* the Court held that jurisdiction to review agency action allegedly in excess of statutory authority cannot be inferred when language in the statute itself expressly forecloses judicial review . . . . More recently, in Board of Governors v. MCorp Financial, Inc., . . . the [Supreme] Court reiterated that a right to judicial review under Kyne may be inferred only if there is no clear statutory prohibition of such review." *116 F.3d at 1028-1029.*[2]

The language of § 8128(b) provides clear and convincing evidence that Congress intended to deny the district courts jurisdiction to review decisions of the DOL. The language is broad enough to include both policy or rule making decisions of the Secretary as well as individual benefit determinations. *Paluca v. Secretary of Labor, 813 F.2d 524, 527-28* (1st Cir.), cert. denied sub nom. *Roberts v. Secretary of Labor, 484 U.S. 943, 108 S. Ct. 328, 98 L. Ed. 2d 355 (1987).*

McDougal-Saddler seeks to distinguish MCorp, Hindes and Clinton County from the present case, arguing that (i) MCorp, the CERCLA case (Clinton County) and the FIRREA case (Hindes) each involves claims with language, history and function very different from those applicable in FECA cases and (ii) in MCorp, Hindes and Clinton County some form of relief was available in future proceedings. The principles of statutory construction set forth in those cases, however, are equally applicable here, regardless of the context. When a plaintiff seeks to rely upon the Kyne doctrine these circumstances are insufficient to overcome a clear statutory prohibition of judicial review such as § 8128(b).

IV. Conclusion

For the foregoing reasons, we will affirm the district court's order granting the DOL's motion to dismiss the complaint.

Footnotes

* Honorable Dickinson R. Debevoise, United States Senior District Judge for the District of New Jersey, sitting by designation.

[1] Alexis M. Herman is presently United States Secretary of Labor.

[2] In dicta four circuits have stated § 1331 jurisdiction exists to review claims that OWCP policy violated clear statutory commands. See *Staacke v. United States Secretary of Labor, 841 F.2d 278, 281-82 (9th Cir. 1988)*, citing *Oestereich v. Selective Serv. Sys., 393 U.S. 233, 89 S. Ct. 414, 21 L. Ed. 2d 402 (1968)* and *Leedom v. Kyne, 358 U.S. 184, 79 S. Ct. 180, 3 L. Ed. 2d 210 (1958)* (finding no clear statutory command); *Woodruff v. United States Dep't of Labor, 954 F.2d 634, 639-40 (11th Cir. 1992)*; (same); *Brumley v. United States Dep't of Labor, 28 F.3d 746 (8th Cir. 1994)*, cert. denied, *513 U.S. 1082, 115 S. Ct. 734, 130 L. Ed. 2d 637 (1995)* (same); *Hanauer v. Reich, 82 F.3d 1304, 1307-09 (4th Cir. 1996)*. These opinions, however, predate our Court's opinions in Hindes and Clinton County.

Filed November 17, 1998

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 98-1068
CLEOPATRA McDOUGAL-SADDLER
Appellant

v.

ALEXIS M. HERMAN, Secretary, U.S. Department of Labor,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA (D.C. No. 97-cv-1908)

Argued October 8, 1998

Before: McKEE, RENDELL, Circuit Judges, and DEBEVOISE, Senior District Judge*

[Filed: November 17, 1998]

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Counsel for Appellees

OPINION OF THE COURT

DEBEVOISE, Senior District Judge:

Appellant, McDougal-Saddler, appeals the district court's order granting the motion of Cynthia Metzler, Acting Secretary, United States Department of Labor ("DOL")1 to dismiss the complaint for lack of subject matter jurisdiction. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and will affirm, although for reasons different from those upon which the district court relied.

I. The Facts

On May 14, 1982 McDougal-Saddler, then a 39-year old U.S. Postal Service distribution clerk, filed a claim with the Office of Workers' Compensation Program ("OWCP") for an injury to her back, upper neck and shoulder sustained on May 8 when handling trays of mail. On June 24 the OWCP began payment of compensation for temporary total disability. Dr. David S. Schwartz, a Board-certified internist and cardiologist, began treating McDougal-Saddler on August and diagnosed cervical and lumbosacral strains. He found his patient to be totally disabled.

After a February 1985 fitness-for-duty evaluation, McDougal-Saddler was offered and accepted reemployment as a distribution clerk with limited duties. She returned to work on March 31, 1985 but again stopped working on April 5, stating that because of pain in her neck, shoulder, arm and back she could not continue. Dr. Schwartz examined her the next day; he diagnosed cervical and lumbar strain and stated she was totally disabled.

On May 7, McDougal-Saddler filed a claim for a traumatic injury to her neck, shoulders and upper and lower back sustained on April 5 when casing mail. On May 20 the OWCP again began payment of compensation for temporary total disability. In a June 17, 1985 report Dr. Schwartz diagnosed cervical radiculopathy. In a May 22, 1986 report he diagnosed chronic pain syndrome including chronic lumbosacral strain and chronic cervical strain. In an April 10, 1987 report Dr. Schwartz wrote, "Because of chronic debilitating pain and limited range of motion due to muscle stiffness and spasm, despite intensive physical therapy and medication, [McDougal-Saddler] is totally disabled from work at this time and for the near indefinite future."

The OWCP referred McDougal-Saddler to Dr. William H. Simon, a Board-certified orthopedic surgeon for a second opinion. In a May 4, 1987 report Dr. Simon diagnosed cervical and lumbar discogenic syndrome with cervical and lumbar nerve root irritation. He concluded:

> Her present findings are those of cervical and lumbar discogenic syndrome due to early degenerative disc disease in the cervical and lumbar spine. This is indicative

> of a genetic predisposition to degenerative disc disease and is not in my opinion due to any specific incidents of trauma occurring at work. . . There is no evidence that she sustained any acute injury that is responsible for this but that she has a slowly developing degenerative condition which limits the amount of work that she can do. She will have to decide whether she wishes to bear with the pain and continue her work or whether she wishes to retire from the work force.

On December 31, 1987 the OWCP notified McDougal-Saddler that it proposed to terminate her compensation on the ground that her disability resulting from her employment injuries had ceased. In response McDougal- Saddler submitted another report of Dr. Schwartz in which he stated that her symptoms were "specifically due" to her May 8, 1982 injury and that her April 5, 1985 injury "added to her previous cervical and lumbosocral strain."

Effective November 20, 1988 the OWCP terminated McDougal-Saddler's compensation on the ground that the weight of the medical evidence established that her disability from her employment injuries ceased by that date. After a hearing an OWCP hearing representative found in a February 21, 1989 decision that McDougal- Saddler had not been afforded due process because she had not been provided with a copy of Dr. Simon's May 4, 1987 report. The hearing representative remanded the case for reinstatement of compensation and a re-evaluation by Dr. Simon.

At Dr. Simon's request a Board-certified radiologist performed a computerized tomography scan of McDougal-Saddler's lumbosacral and cervical spine. On the basis of the resulting report Dr. Simon revised his original opinion, stating in a November 15, 1989 report, "we now have objective evidence that this patient has cervical discogenic abnormalities beyond degenerative changes both in her neck and back." He did not, however, attribute these discogenic abnormalities, as Dr. Schwartz did, to the 1982 and 1985 work incidents, and he disagreed with Dr. Schwartz's finding of total disability, stating, "I do think her discogenic abnormalities in her neck and back are enough to partially disable her but certainly not to totally disable her from returning to some form of work presuming that she is conditioned properly." Based on the entirety of the reports which had been submitted to it, the OWCP found that there was a conflict of medical opinion. On October 22, 1991, it referred the case to Dr. John T. Williams, a Board-certified orthopedic surgeon, to resolve the conflict. The OWCP purported to act pursuant to the provisions of 5 U.S.C. § 8123(a), which provides: "If there is disagreement between the physician making the examination for the United States [Dr. Simon] and the physician of the employee [Dr. Schwartz], the Secretary shall appoint a third physician who shall make an examination." According to the Federal (FECA) Procedure Manual, "The [Employees' Compensation Appeals Board] has stated that `an impartial specialist's report is entitled to greater weight than other evidence of record as long as his conclusion is not vague, speculative or equivocal and is supported by substantial medical reasoning'." Part Two, Chapter 2-810.11 c.(2).

Dr. Williams conducted a physical examination of McDougal-Saddler and in a January 21, 1992 report stated, among other things:

> On my physical examination today there are no positive objective findings to correlate to her complaints. I see no residual pathology as it relates to the injury of 1982 or 1985. I feel that she has recovered to the extent that she is able to be gainfully employed. She has degenerative changes in her cervical and lumbar spine which are compatible with her age and her type of body build. She is obese.
>
> I feel that she is able to resume her normal duties without any restrictions. If I were to place any restrictions on this patient they would be on the basis of the degenerative pathology which obviously preexisted the work-related injury of 1982. The restrictions would be related to the degenerative changes in her cervical and lumbar spine.

Thereafter Dr. Williams reviewed the medical records and reported his findings on March 4, 1992:

> [T]his degenerative pathology [in McDougal-Saddler's lumbar and cervical spine] is part and parcel of the normal aging process and has been aggravated by the patient's weight. Since the day of her accident she has been carried with a diagnosis of a cervical and lumbosacral sprain. These types of sprain strains are of a

> temporary and transitory nature and are self-resolving. The work-related incident may have aggravated the preexistent pathology but again on a temporary and transitory nature which resolved leaving her with her preexistent pathology.

As to x-ray findings from 1982, 1984 and 1987, Dr. Williams reported:

> These studies were normal in 1982 and in 1984. Three years later in 1987 we see changes.
> The patient had not been working during this interval so there is no work-related trauma that produced the findings noted on x-rays in 1987. So it was on the basis of the normal wear and tear that she began to show signs of degenerative pathology in 1987.

Dr. Williams reviewed the findings of the 1989 CT scan on the basis of which Dr. Simon modified his first report. Dr. Williams found:

> So what we are seeing here is the progression of degenerative joint and degenerative disc disease over a period of approximately seven years secondary to the normal wear and tear on the body and the aging process.
> The work-related injury did not cause the degenerative pathology first noted in 1987.

The OWCP terminated McDougal-Saddler's compensation on September 20, 1992, concluding that the weight of the medical evidence, represented by Dr. Williams's reports, established that the effects of her April 5, 1985 and May 11, 1982 injuries had ceased. On appeal an OWCP hearing representative found in a November 24, 1993 decision that the opinion of Dr. Williams, the impartial medical specialist, resolved the conflict of medical opinion and established that the effects of the 1982 and 1985 injuries had ceased by September 20, 1992. By letter dated February 27, 1995 McDougal-Saddler requested reconsideration, contending, among other things, that Dr. Williams was not an impartial medical specialist entitled to special weight because Dr. Simon's November 15, 1989 report did not conflict with the conclusions of Dr. Schwartz. The OWCP denied the request for reconsideration, and McDougal-Saddler appealed to the Employees' Compensation Appeals Board ("ECAB").

The ECAB authored a detailed opinion. It weighed the evidence which had been developed during the years following McDougal-Saddler's original injury in May 1982. It contrasted the qualifications of Drs. Williams and Schwartz and analyzed the basis and reasoning of their respective reports. It found "that the weight of the medical evidence establishes that [McDougal-Saddler's] disability related to her May 8, 1982 and April 5, 1985 employment injuries ended by September 20, 1992."

The ECAB, however, agreed with McDougal-Saddler's contention that Dr. Williams was not an impartial medical specialist, not because he was not impartial, but rather because at the time of his appointment there was no conflict of medical opinion:

Appellant is correct in arguing that Dr. Williams was not an impartial medical specialist because there was no conflict of medical opinion at the time of the Office's referral to Dr. Williams. The reports of Dr. Simon, the Board-certified orthopedic surgeon whose second opinion was the basis of the Office's declaration of a conflict of medical opinion, were not sufficient to create such a conflict. In his report dated October 25, 1989, Dr. Simon stated that appellant's "only findings are those of progressive degenerative changes in her neck and back and these certainly would not be causally related to one episode of trauma occurring in 1982 or in 1985" and that "there is no evidence that she has a disc herniation or fracture or dislocation or serious lumbar stenosis problem that would functionally incapacitate her." In his report dated November 15, 1989, Dr. Simon stated that a CT scan done on November 13, 1989 showed "objective evidence that this patient has cervical discogenic abnormalities beyond degenerative changes both in her neck and back." While Dr. Simon did not attribute these "discogenic abnormalities beyond degenerative changes" to appellant's employment injuries, his November 15, 1989 report casts serious doubt on the conclusion in his October 25, 1989 report that appellant had only progressive degenerative changes.

(App. A 41)

The consequence which the ECAB attributed to the denial of impartial medical specialist status to Dr. Williams was ". . . the reports of Dr. Williams are thus not entitled to the special weight afforded to the opinion of an impartial medical specialist resolving a conflict of medical opinion . . ." The ECAB treated Dr. Williams's reports in the same manner as it treated the other medical evidence, giving it no special deference. On March 20, 1996 it affirmed the decision of the OWCP and thereafter denied a petition for reconsideration.

II. The District Court Decision

FECA does not provide for an appeal of an adverse decision of the ECAB. In fact it decrees finality to such a decision:

> (a) The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review, may - (1) end, decrease, or increase the compensation previously awarded; or (2) award compensation previously refused or discontinued.
>
> (b) The action of the Secretary or his designee in allowing or denying a payment under this subchapter is- (1) final and conclusive for all purposes and with respect to all questions of law and fact; and (2) not subject to review by another official of the

> United States or by a court by mandamus or otherwise.

5 U.S.C. § 8128. Nevertheless, McDougal-Saddler filed a complaint and petition for declaratory and injunctive relief in the district court, alleging that DOL has adopted procedures which undercut the statutory directive regarding the appointment of the third physician. She contends that they are subject to review by this court because these procedures violate the clear mandate of the applicable statute and regulation. The complaint cites 5 U.S.C. § 8123(a) which provides in relevant part:

> If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary **shall appoint a third physician who shall make an examination**. (emphasis added).

The complaint cites 20 C.F.R. §10.408 which provides:

> If there should be disagreement between the physician making the examination on the part of the United States and the injured employee's physician, the Office **shall appoint a third physician, qualified in the appropriate specialty, who shall make an examination . . .** (emphasis added).

McDougal-Saddler's complaint alleges that the language of the statute is unambiguous and mandatory as reflected in the regulation quoted above. That is, whenever there is any

disagreement between the employee's and OWCP's physician, the OWCP must appoint a third physician. In its Federal (FECA) Procedural Manual and in practice according to McDougal-Saddler's complaint, OWCP has departed from the statutory command and appoints a third physician only "where the analysis of the evidence demonstrates conflicting opinions or conclusions which are supported almost equally." Generally "[c]areful analysis of the medical evidence should allow for resolution of most issues without resorting to a referee or `impartial' specialist" (Federal (FECA) Procedure Manual, Part Two, Chapter 2- 810-11 a, App. 53). This weighing the evidence procedure, according to the complaint, constitutes a clear violation of § 8123(a).

Defendant moved in the district court pursuant to Fed. R. Civ. P. 12(b)(1) seeking dismissal of the complaint for lack of subject matter jurisdiction. It asserted that§ 8128(b) of FECA bars judicial review of DOL's adjudication of McDougal-Saddler's FECA claim. It asserted that the allegations of the complaint do not constitute a substantial, cognizable constitutional claim over which the district court would have jurisdiction despite § 8128(b). Finally it asserted that there was no exception under § 8128(b) for claims of a violation of a clear statutory mandate and, in any event, the allegations of the complaint do not constitute such a claim.

The district court noted that there is an exception to FECA's prohibition of judicial review if a plaintiff presents a "cognizable" constitutional violation. Rodriguez v. Donovan, 769 F. 2d 1344 (9th Cir. 1995); Czerkies v. Department of Labor, 73 F. 3d 1435, 1438 (7th Cir. 1996). The district court also noted that some courts of appeals have recognized a second exception to the prohibition if the plaintiff establishes

that the actions of the Department of Labor violate a "clear statutory mandate", see, e.g., Hanauer v. Reich, 82 F. 3d 1304, 1309 (4th Cir. 1996).

The district court rejected McDougal-Saddler's constitutional claim. It held that FECA PM2-810 providing for a weighing of the medical evidences before appointing a third physician was simply an interpretive rule clarifying the word "disagreement" in § 8123(a) and therefore did not require public notice or a public comment period to be valid. Its application to McDougal-Saddler did not violate her due process rights or otherwise create a cognizable constitutional claim. McDougal-Saddler does not challenge this ruling in her appeal.

The district court assumed for the purposes of its decision that a violation of a clear statutory mandate creates subject matter jurisdiction for a court to hear a case brought under FECA. It found, however, that because the ECAB interpretation was plausible, there was no such violation, holding:

> The Court concludes that FECA PM2-810 instructs claims examiners in how to determine whether a "disagreement" between physicians exists, and that defendant's interpretation of 5 U.S.C. § 8123(a), using FECA PM 2-810, is plausible. Under that interpretation, it was appropriate for ECAB to decide plaintiff's claim based on the weight of the medical evidence. ECAB did not violate a clear statutory mandate in evaluating plaintiff's

> claim. The statute did not, under the facts presented, require ECAB to remand the case for the appointment of an independent physician to conduct an examination of plaintiff.

The court granted DOL's motion to dismiss.

III. Discussion

This appeal raises important jurisdictional and substantive questions which our court has not addressed.

The language of § 8128(b) is open to differing interpretations. It provides that "[t]he action of the Secretary or her designee in allowing or denying a payment . . ." is (1) final and conclusive for all purposes . . ." It can be argued, as McDougal-Saddler does, that the words "allowing or denying a payment" refer to decisions in individual cases and do not include challenges to "structural components of the system." Czerkies v. U.S. Dept. of Labor, 73 F.3d 1435 (7th Cir. 1996). In dicta four circuits have asserted § 1331 jurisdiction to review claims that OWCP policy violated clear statutory commands. See Staacke v. United States Secretary of Labor, 841 F.2d 278, 281-82 (9th Cir. 1988), citing Oestereich v. Selective Serv. Sys., (1968) and Leedom v. Kyne, (1958)(finding no clear statutory command); Woodruff v. United States Dep't of Labor, 954 F.2d 634, 639-40 (11th Cir. 1992); (same); Brumley v. United States Dep't of Labor, 28 F. 3d 746 (8th Cir. 1994)(same); Hanauer v. Reich, 82 F.3d 1304, 1307-09 (4th Cir. 1996).

McDougal-Saddler makes a plausible argument that the procedures specified in the FECA Procedures Manual violate

the clear mandate of § 8123(a). The statute provides that "[i]f there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination" (emphasis added). The Procedure Manual requires that OWCP examiner shall engage in a weighing process evaluating the reports of the two physicians and appointing a third physician only "where the analysis of the evidence demonstrate conflicting opinion or conclusions which are almost equally supported" (FECA Bulletin 83-56 (Nov. 9, 1983)). The reasons for these procedures are suggested in the bulletin mandating them:

> In many cases, the findings or opinions of an independent specialist will differ from those of the claimant's attending physician. Previously the tendency in such cases was to automatically refer the claimant and the case record to an impartial specialist. This is a time-consuming process which is not always necessary. Frequently, a decision can be reached by weighing the medical evidence of record without referral to an impartial specialist.

On the present appeal DOL has added extra cost as well as consumption of time as a reason to curtail use of a third physician. If in fact the statute requires the appointment of a third physician these are considerations which DOL should present to Congress rather than departing from a statutory mandate.

Despite the importance of the jurisdictional and substantive issues which McDougal-Saddler raises, they cannot be addressed in this case. A third physician, Dr. Williams, was in fact appointed to review her physical condition; she has received that to which she was entitled under § 8123(a) and thus there is no case or controversy.

FECA establishes a comprehensive and exclusive worker's compensation scheme for federal employees. The Secretary of Labor, or his or her designee, has the authority to administer and to decide all questions arising under FECA. 5 U.S.C. § 8145. Pursuant to this authority the Secretary has delegated the authority provided by§§ 8145 and 8149 to the OWCP, which is responsible for the administration and implementation of FECA. 20 C.F.R. §10.2. Pursuant to statutory mandate the ECAB was established to hear and make final decisions on appeals taken from determinations and awards with respect to claims. The regulations provide that "once OWCP has accepted a claim and paid compensation, it has the burden, before terminating . . . compensation, of establishing by the weight of the evidence that the disability for which compensation was paid has ceased . . ." 20 C.F.R. § 10.110. If a claimant considers herself aggrieved by the OWCP's final determination, FECA provides the means for review. From the date of the decision, the claimant may: 1) within 30 days, request a hearing before an OWCP hearing representative or request that such representative review the written record, 5 U.S.C. § 8124, 20 C.F.R.§ 10.131; 2) within one year, request reconsideration, 5 U.S.C.§ 8128, 20 C.F.R. § 10.138; or 3) within one year,file an appeal with the ECAB. 20 C.F.R. § 10.139.

It is in the context of this claims and appeals process that § 8123(a) requires that "[i]f there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall resolve the conflict." See also 20 C.F.R. §10.408 which mirrors this statutory language but adds the requirement that the third physician be qualified in the appropriate specialty.

As recited above in the statement of the facts both the OWCP and McDougal-Saddler followed these procedures when on December 31, 1987 the OWCP notified McDougal- Saddler that it proposed to terminate her compensation and thereafter when the termination was effected on November 20, 1988 and hearings and appeals were pursued.

McDougal-Saddler submitted a number of reports of Dr. Schwartz in which he described her back and shoulder conditions, attributed them to the April 5, 1985 and May 11, 1982 work incidents, and opined that McDougal- Saddler was totally disabled from work. Dr. Simon submitted a May 4, 1987 report in which he stated that McDougal-Saddler's condition was genetic and not due to any specific incidents of trauma at work. In 1989, after Dr. Simon received a CT scan report which he had requested, he modified his opinion and stated that there was objective evidence that McDougal-Saddler had cervical discogenic abnormalities beyond degenerative changes both in her neck and back. He did not attribute these abnormalities to the 1982 and 1985 work incidents, and he did not agree with Dr. Schwartz that the abnormalities prevented McDougal-Saddler from returning to some form of work.

It was readily apparent that even though Dr. Simon modified his original opinion, there was a significant area of disagreement between him and Dr. Schwartz. Even though for the purposes of its opinion the ECAB chose not to treat this as a "disagreement" between the two physicians, it was clearly a "disagreement" within the plain meaning of § 8123(a).

The OWCB was justified in concluding that there was a disagreement between the physician making the examination for the United States and the physician of the employee. It acted well within the statute and regulations when it appointed Dr. Williams as a third physician. The record demonstrates that Dr. Williams did everything that a third physician is supposed to do, examining McDougal- Saddler, reviewing the medical records and providing a comprehensive report setting forth his findings and the reasons for his findings.

McDougal-Saddler received everything she was entitled to by way of appointment of a third physician. The decision of the ECAB not to recognize Dr. Williams as a third physician does not change this conclusion. That decision only worked to McDougal-Saddler's benefit. Dr. Williams's report was adverse to her position. By failing to treat it as the report of a third physician, the ECAB deprived it of special weight status and treated it in the same manner it treated other medical evidence.

Thus regardless of DOL's interpretation of § 8123(a), McDougal-Saddler received the benefit of the third physician provision. She has not been injured by the manner in which the OWCB may treat the third physician requirement in other

cases, and her complaint in effect seeks simply an advisory opinion. Article III § 2 of the Constitution confers jurisdiction in the federal courts over "cases" and "controversies." To constitute a case or controversy, there must be a plaintiff who has standing to bring the action. Lujan v. Defenders of Wildlife, (1992). To have standing a plaintiff must establish: An "injury in fact" - an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; second, there be a causal connection between the injury and the conduct complained of - the injury has to be "fairly trace[able] to the challenged action of the defendant, and not .. . the result [of] the independent action of some third party not before the court". Third, it must be"likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Id. at 560-61.

McDougal-Saddler sought declaratory and injunctive relief that would have had the effect of restoring her benefits until she had been evaluated by an impartial specialist. The complaint also sought a declaration that "DOL's action in terminating plaintiff's compensation benefits without following 5 U.S.C. 8123(a) and 20 CFR 10.408 is not permitted by the Federal Employees' Compensation Act, 5 U.S.C. 8101 et seq." and "a permanent injunction directing DOL to restore to all other FECA claimants their entitlement to benefits that DOL has terminated or otherwise reduced in violation of the provisions of 5 U.S.C. § 8123(a) and 20 CFR 10.408 until such time as DOL has carried out the requirements[of] 5 U.S.C. 8101 et seq."

As noted above, McDougal-Saddler has received the benefit of § 8123(a)'s third physician requirement. There is no likelihood that she will in the future be filing a claim with the OWCP. Thus she has suffered no injury resulting from DOL's application of § 8123(a) and is not likely to suffer such injury in the future. Her requests for declaratory and injunctive relief challenging the DOL's application of § 8123(a) might benefit other persons, but she herself lacks a cognizable interest in the outcome of this case. In these circumstances McDougal-Saddler does not have standing, and it was appropriate for the district court to dismiss this case. Fair Housing Council v. Montgomery Newspapers, 141 F. 3d 71, 80 (3d Cir. 1998); Blanciak v. Allegheny Ludlum Corp., 77 F. 3d 690, 698-99 (3d Cir. 1996).

IV. Conclusion

For the foregoing reasons, we will affirm the district court's order granting the DOL's motion to dismiss the complaint.

A True Copy: Teste:

Clerk of the United States Court of Appeals for the Third Circuit 16

FOOTNOTES

*Honorable Dickinson R. Debevoise, United States Senior District Judge for the District of New Jersey, sitting by designation.

1. Alexis M. Herman is presently United States Secretary of Labor.

CLEOPATRA MCDOUGAL-SADDLER v. ALEXIS M. HERMAN, SECRETARY, U.S. DEPARTMENT OF LABOR

CIVIL ACTION NO. 97-1908

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

December 24, 1997, Decided

December 24, 1997, Filed; December 26, 1997, Entered

COUNSEL:
For CLEOPATRA MCDOUGAL-SADDLER, PLAINTIFF: JEFFREY P. ZEELANDER, RUCH AND GONTRAM, PHILA, PA USA.

For CYNTHIA METZLER, DEFENDANT: JAMES G. SHEEHAN, ASSISTANT U.S. ATTORNEY-CIVIL DIVISION, PHILA, PA USA. NADINE M. OVERTON, U.S. ATTORNEY'S OFFICE, PHILA, PA USA.

JUDGES:
JAN E. DUBOIS, J.

OPINIONBY:
JAN E. DUBOIS

OPINION:

MEMORANDUM AND ORDER

AND NOW, to wit, this 24th day of December, 1997, upon consideration of the Motion to Dismiss filed by defendant, Alexis M. Herman, Secretary, United States Department of Labor (Document No. 3, filed May 19, 1997); the Memorandum in Opposition to Defendant's Motion to Dismiss filed by plaintiff, Cleopatra McDougal-Saddler (Document No. 4, filed June 2, 1997), and Defendant's Reply to Plaintiff's Opposition to Motion to Dismiss (Document No. 5, filed June 26, 1997) **IT IS ORDERED** that Defendant's Motion to Dismiss is **GRANTED** and the action is **DISMISSED** pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction

.

Defendant's Motion to Dismiss is granted for the following reasons:

I. Facts

1. Plaintiff, Cleopatra McDougal-Saddler, a former employee of the United States Postal Service, suffered injuries at her workplace on May 8, 1982 and April 5, 1985. Beginning in 1982, she was paid workers' compensation benefits under the Federal Employee Compensation Act ("FECA"), *5 U.S.C. § 8101* et seq., based on the opinion of her physician, Dr. David S. Schwartz, that she was totally disabled as a result of her injuries.[1]

2. In May 1989, Dr. William H. Simon, a physician appointed by the Office of Workers' Compensation Programs of the Department of Labor ("OWCP"), examined plaintiff and submitted two reports. In the first report, dated October 25, 1989, Dr. Simon opined that plaintiff's condition was caused by a degenerative condition, not her workplace injuries. After Dr. Simon reviewed a computerized

tomography scan of plaintiff's spine, he concluded in the second report, dated November 15, 1989, that degeneration did not wholly explain plaintiff's condition.

3. A medical advisor at OWCP reviewed Dr. Simon's reports and determined that they conflicted with Dr. Schwartz's medical opinion. Therefore, on October 22, 1991, the medical advisor directed plaintiff to be examined by a third physician, Dr. John T. Williams. The referral was based on a provision of FECA requiring appointment of a third physician if there is a disagreement between the claimant's physician and the physician appointed by the Department of Labor. *5 U.S.C. § 8123*(a) (1996).[2]

4. Dr. Williams examined plaintiff and, on January 21, 1992 and March 4, 1992, submitted reports finding that her condition was not the result of her workplace injuries. OWCP therefore decided on September 2, 1992 to terminate plaintiff's workers' compensation, effective September 20, 1992.

5. Plaintiff requested a hearing on the termination, which was held on September 23, 1993. The OWCP hearing officer found that, based on Dr. Williams' reports, plaintiff's disability due to her workplace injuries had ended by September 2, 1992. Plaintiff twice requested reconsideration, and OWCP denied both requests, first on March 25, 1994 and then on June 6, 1995. Plaintiff then appealed the termination of her benefits to the Employee Compensation Appeals Board ("ECAB"), an appellate body of the Department of Labor.

6. On March 20, 1996, ECAB issued a decision affirming the decision of OWCP. In its decision, ECAB found that Dr. Simon's report was "not sufficient" to conflict with Dr. Schwartz's report, and that plaintiff was therefore improperly referred to Dr. Williams to resolve the alleged disagreement between Drs. Schwartz and Simon. However, ECAB found that Dr. Williams' report constituted the "weight of the medical evidence." Therefore, pursuant to Federal (FECA) Procedure Manual, Ch. 2-810 (April 1993) ("FECA PM 2-810"),[3] ECAB concluded that no disagreement existed between Dr. Schwartz and Dr. Williams, and there was no need for plaintiff to be examined by another doctor. Relying on Dr. Williams' reports, ECAB affirmed the termination of plaintiff's workers' compensation benefits.

II. Analysis

7. Plaintiff's complaint seeks declaratory and injunctive relief. She alleges that in its analysis of her claim, ECAB violated her right to due process and violated a "clear statutory mandate" in FECA to refer her to a third physician in view of the disagreement between her physician, Dr. Schwartz, and one of the physicians appointed by the Department of Labor, Dr. Williams.

8. Defendant, Alexis M. Herman, Secretary, United States Department of Labor, has moved under Federal Rule of Civil Procedure 12(b)(1) to dismiss the action for lack of subject matter jurisdiction pursuant to *5 U.S.C. § 8128*(b).

9. FECA explicitly bars a court from reviewing an action by the Secretary of Labor "allowing or denying a payment" under the statute: "The action of the Secretary is . . . not

subject to review . . . by a court by mandamus or otherwise." *5 U.S.C. § 8128*(b)(2) (1996); see *Hancock v. Mitchell, 231 F.2d 652 (3d Cir. 1956)* (holding that the prohibition on judicial review of FECA claims is constitutional).

10. Courts have recognized an exception to the prohibition on judicial review in FECA if the plaintiff presents evidence of a "cognizable" constitutional violation. *Rodrigues v. Donovan, 769 F.2d 1344 (9th Cir. 1995); Czerkies v. Department of Labor, 73 F.3d 1435, 1438 (7th Cir. 1996)* (citing cases). However, the constitutional claim must be more than an allegation.

11. Some courts of appeals have recognized a second exception to the prohibition if the plaintiff establishes that the actions of the Department of Labor violate a "clear statutory mandate." See, e.g., *Hanauer v. Reich, 82 F.3d 1304, 1309 (4th Cir. 1996); Brumley v. Department of Labor, 28 F.3d 746 (8th Cir. 1994); Woodruff v. Department of Labor, 954 F.2d 634 (11th Cir. 1992).* The Third Circuit has not yet ruled on this issue. See, also, Chaklos v. Reich, No. 95-1763, slip op. (W.D. Pa. 1996) aff'd by *101 F.3d 689 (3d Cir. 1996)* (table).

12. Plaintiff contends that both exceptions apply in this case. She alleges that ECAB both acted unconstitutionally and violated a clear statutory mandate by affirming the termination of her benefits.

A. Plaintiff's Constitutional Claim

13. Plaintiff argues that ECAB violated her right to due process under the Fifth Amendment by using the procedures

in FECA PM 2-810 to evaluate her workers' compensation claim.

14. FECA provides that "if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." *5 U.S.C. § 8123*(a) (1996).

15. FECA PM 2-810 includes criteria for weighing medical evidence to determine if a disagreement exists. The factors to be used include whether the opinion is well reasoned, comprehensive, consistent with physical findings, non-equivocal, and based on "a complete factual and medical background" and an actual examination of the claimant. The qualifications and areas of expertise of the doctor are also considered. FECA PM 2-810 at 3(a-b). FECA PM 2-810 then describes the circumstances which make it necessary for a third physician to examine a claimant: "Where the analysis of the evidence demonstrates conflicting opinions or conclusions which are supported almost equally, the services of a referee specialist must be utilized." Id. at 11(a).

16. Plaintiff claims that rather than weighing the medical evidence in the reports of Drs. Schwartz and Williams using FECA PM 2-810, see, In re Cleopatra McDougal-Saddler, slip op., No. 95-2634 (ECAB March 20, 1996), ECAB should have remanded her case for an examination by a third physician, (in reality a fourth physician) as required by § 8123(a).[4]

17. According to plaintiff, FECA PM 2-810 alters the meaning of § 8123(a) of FECA, and is therefore a

"legislative rule." See, *Dia Navigation Co. v. Pomeroy, 34 F.3d 1255, 1264 (3d Cir. 1994)* (defining a legislative rule as one that "creates rights, assigns duties, or imposes obligations, the basic tenor of which is not already outlined in the law itself . . .") (internal citations omitted).

18. To be valid, a legislative rule requires notice in the Federal Register that it has been proposed and a period of public comment before it is implemented. See, Administrative Procedure Act, *5 U.S.C. § 553* (1996). As no notice or comment period was provided before FECA PM 2-810 was implemented, plaintiff contends that it is a void rule and was unconstitutionally used to evaluate her claim for workers' compensation benefits.

19. Defendant argues that FECA PM 2-810 is an "interpretive" rule used to clarify the word "disagreement" in *5 U.S.C. § 8123*(a), n5 and therefore it did not need public notice or a comment period to be effective. See, *Dia Navigation, 34 F.3d at 1255* ("interpretive rules typically involve construction or clarification of a statute or regulation.") and *5 U.S.C. § 553*(b)(A) (1996) (notice and comment requirement does not apply to interpretive rules).

20. The Court concludes that FECA PM 2-810 is an interpretive rule which clarifies the word "disagreement" in *5 U.S.C. § 8123*(a). See, FECA PM 2-810 at 2(d) ("A thorough understanding of how to weigh medical evidence will assist the [claims examiner] in determining when and how further medical development should be undertaken and in assigning weight to the medical evidence received") and see FECA PM 2-810 at 11(a) ("Where the analysis of the evidence demonstrates conflicting opinions or conclusions which are

supported almost equally, the services of a referee specialist must be utilized.").

21. As an interpretive rule, FECA PM 2-810 did not require public notice or a public comment period to be valid. Thus, ECAB's application of FECA PM 2-810 to plaintiff's claim for benefits did not violate plaintiff's due process rights and did not otherwise create a cognizable **[*11]** constitutional claim.

22. Plaintiff's allegation of a violation of her due process rights does not create subject matter jurisdiction in this case.

B. Plaintiff's Claim of a Violation of a Clear Statutory Mandate

23. Plaintiff argues that the actions of the Department of Labor violated a "clear statutory mandate" in FECA which creates subject matter jurisdiction in this Court.

24. Assuming, arguendo, that a violation of "clear statutory mandate" creates subject matter jurisdiction for a court to hear a case brought under FECA, plaintiff has not made a showing of such a violation.

25. To determine whether a clear statutory mandate has been violated, the Court must conduct a "cursory review of the merits." *Hanauer, 82 F.3d at 1309.* If the Secretary of Labor's interpretation of the statute is "plausible," then no violation of a clear statutory mandate has occurred. *Staacke v. United States Secretary of Labor, 841 F.2d 278 (9th Cir. 1988).*

26. In the instant case, plaintiff argues that defendant violated the clear statutory mandate in FECA to refer plaintiff to a

third physician if there was a disagreement between plaintiff's physician and the physician appointed by the Department of Labor. See *5 U.S.C. § 8123*(a) (1996).[6]

27. Defendant contends that the use of FECA PM 2-810 to interpret the word "disagreement" in § 8123(a) n7 is plausible, and therefore no violation of a clear statutory mandate has occurred.[8]

28. The Court concludes that FECA PM 2-810 instructs claims examiners in how to determine whether a "disagreement" between physicians exists, and that defendant's interpretation of *5 U.S.C. § 8123*(a), using FECA PM 2-810, is plausible. Under that interpretation, it was appropriate for ECAB to decide plaintiff's claim based on the weight of the medical evidence.

29. ECAB did not violate a clear statutory mandate in evaluating plaintiff's claim. The statute did not, under the facts presented, require ECAB to remand the case for the appointment of an independent physician to conduct an examination of plaintiff.

BY THE COURT:
JAN E. DUBOIS, J.

Footnotes

[1] Plaintiff was paid workers' compensation benefits until she returned to work briefly in March 1985. On April 5, 1985 she sustained a second workplace injury which rendered her unable to work, and she was again paid workers' compensation benefits.

[2] "If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." *5 U.S.C. § 8123*(a) (1996).

[3] "Careful analysis of the medical evidence should allow for resolution of most issues without resorting to a referee or 'impartial' specialist." It is only "where the analysis of the evidence demonstrates conflicting opinions or conclusions which are supported almost equally [that] the services of a referee specialist must be utilized." FECA PM 2-810 at 11(a).

[4] See, supra, note 2.

[5] See, supra, note 2.

[6] See, supra, note 2.

[7] See, supra, paragraph 15 for a description of the criteria included in FECA PM 2-810.

[8] This appears to be a change from earlier ECAB policy. In similar cases, when OWCP mistakenly determined that two doctors disagreed, ECAB would remand the case for examination by a new physician to resolve the conflict between the claimant's doctor and the doctor who was erroneously appointed as a "third physician" to resolve a disagreement later found not to exist. See, In re Myrtle Pittman, 40 ECAB 880, 881 (1989) (citing cases). However, as discussed supra, this change in policy does not violate a "clear statutory mandate" and would not give this Court subject matter jurisdiction even if the Court accepted the violation of a clear statutory mandate theory of jurisdiction.

CLEOPATRA McDOUGAL-SADDLER, Appellant v. ALEXIS M. HERMAN, Secretary, U.S. Department of Labor, Appellee

No. 98-1068

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Dated 10/6/99

SUR PETITION FOR REHEARING

Presnet: BECKER, CHIEF JUDGE

SLOVITER, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, MCKEE and RENDELL, Circuit Judges and DEBEVOISE, District Judge*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judes who paritcipated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judge Becker would have granted rehearing.

BY THE COURT,

Circuit Judge
Hon. Theordore A. McKee